Supreme Court, U.S.
FILED

94 953 NOV 23 1994

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

JESS T. SIMPSON,

Petitioner,

v.

OFFICE OF THRIFT SUPERVISION

Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

JONATHAN B. NOLL*
DAVID UTEVSKY
Foster Pepper & Shefelman
Suite 3400
1111 Third Avenue
Seattle, WA 98101
(206) 447-4400

* Counsel of Record

92 pp

QUESTIONS PRESENTED

1. Whether there is any statute of limitations applicable to claims for restitution brought by the Office of Thrift Supervision ("OTS") on behalf of healthy financial institutions which have not been placed in conservatorship or receivership; and whether the OTS can pursue claims for restitution when those claims were barred by the applicable state statutes of limitations before the acquisition of those claims by the OTS.

2. Whether the Petitioner was denied due process of law because the Director of the OTS both signed and issued the Notice of Charges and also made the final determination on the merits of those charges.

3. Whether the Financial Institutions Reform, Recovery and

Enforcement Act authorizes the OTS to initiate claims against a former institution-affiliated party when the institution is solvent, has not been placed in conservatorship or receivership and is fully capable of pursuing the claims on its own behalf.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF CASE 11

REASONS FOR GRANTING THE PETITION . . 16

I. STATUTE OF LIMITATIONS . . . 16

II. DENIAL OF DUE PROCESS . . . 27

III. FIRREA DOES NOT GRANT OTS AUTHORITY TO PURSUE CLAIMS ON BEHALF OF SOLVENT BANKS 47

CONCLUSION 60

TABLE OF AUTHORITIES

Page

Cases

American Gen. Ins. Co. v. FTC, 589 F.2d 462 (9th Cir. 1979) 32

Amos Treat & Co. v. SEC, 306 F.2d 260 (D.C. Cir. 1962) 31

Cruz v. Ferre, 571 F. Supp. 125 (S.D. Fla. 1983) 33, 34

FDIC v. Cocke, 7 F.3d 396 (4th Cir. 1993) 21

FDIC v. Consolidated Mortgage & Fin. Corp., 805 F.2d 14 (1st Cir. 1986) . 21

FDIC v. Dawson, 4 F.3d 1303 (5th Cir. 1993) 21

FDIC v. Former Officers & Directors of Metro. Bank, 884 F.2d 1304 (9th Cir. 1989) 21

FDIC v. Hinkson, 848 F.2d 432 (3d Cir. 1988) 21

FDIC v. McSweeney, 976 F.2d 532 (9th Cir. 1992) 21

FDIC v. Regier Carr & Monroe, 996 F.2d 222 (10th Cir. 1993) 21

Flores v. Meese, 942 F.2d 1352 (9th Cir. 1991) 30

Page

FTC v. Cement Inst., 333 U.S. 683 (1948) 39, 40

Guaranty Trust Co. v. United States, 304 U.S. 126 (1938) 22

Goldberg v. Kelly, 397 U.S. 254 (1970) 30

In re Caleb D. West, Jr., OTS Order No. AP 92-155 (Dec. 4, 1992) 36

In re Keating, OTS Order No. AP 91-20 (May 11, 1991) 40

In re Seidman, 1994 WL 498653 (3d Cir. Sept. 14, 1994) 42

In re Murchison, 349 U.S. 133 (1955) 29, 30, 33, 37

Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) 29, 32, 37

Morrissey v. Brewer, 408 U.S. 471 (1972) 30

National Rifle Ass'n v. U.S. Postal Serv., 407 F. Supp. 88 (D.D.C. 1976) 33

Resolution Trust Corp. v. Krantz, 757 F. Supp. 915 (N.D. Ill. 1991) 22

Schweiker v. McClure, 456 U.S. 188 (1982) 41

Page

United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc., 787 F.2d 128 (3d Cir. 1986) 35

Wachtel v. OTS, 982 F.2d 581 (D.C. Cir. 1993) 59

Walker v. City of Berkeley, 951 F.2d 182 (9th Cir. 1991) 31, 41

Ward v. Village of Monroeville, 409 U.S. 57 (1972) 34, 35

Withrow v. Larkin, 421 U.S. 35 (1975) 31, 33, 36, 39, 40, 41

Statutes

12 U.S.C. § 1813(u) 3, 52

12 U.S.C § 1818(i)(2)(G) 4, 46

12 U.S.C § 1821(d)(14)(A) . . 5, 24, 25

28 U.S.C. § 1254(1) 2, 6

Revised Code of Washington 4.16.080 . . . . . 7, 19

Other

12 C.F.R. § 563.40(a), (b) . . . 10, 19

Page

American Bar Association Working Group on Lawyers' Representation of Regulated Clients, "Laborers in Different Vineyards?" (Discussion Draft Report dated Jan. 22, 1993) 37

Bank Policies Found Biased, N.Y. Times, Nov. 2, 1992 63

Lawrence G. Baxter, Judicial Responses to the Recent Enforcement Activities of the Federal Banking Regulators, 59 Fordham L. Rev. 20, S193 (1991) . 37

Thomas C. Hayes, Texan Gets Five Years in Big S.&L. Collapse, N.Y. Times, Apr. 3, 1991 63

Robert D. Hershey, Jr., Thrift Office Will Open Its Cases, N.Y. Times, July 6, 1990 61

David Johnston, 100 Possible Cases of Savings Fraud Given U.S. Priority, N.Y. Times, July 7, 1990 61

Stephen Labaton, Judge Rejects Keating Suit: Sees 'Looting' of Lincoln, N.Y. Times, Aug. 24, 1990 . 62

Stephen Labaton, Return of $30 Million Sought From Ex-Chief of Centrust, N.Y. Times, Oct. 23, 1990 62

Nathaniel C. Nash, Keating and Five Associates Sued by Savings Regulator, N.Y. Times, Aug. 10, 1990 62

Page

Martin Tolchin, Accounting Firm's Pact on S.&L.'s, N.Y. Times, Dec. 13, 1990 63

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit reported at 29 F.3d 1418 (9th Cir. 1994) (Appendix A).

The Decision of Administrative Law Judge Paul S. Cross, dated February 12, 1991 (Appendix B).

The Decision and Order of the Office of Thrift Supervision dated November 18, 1992 (Appendix C).

The Order of the Office of Thrift Supervision dated January 4, 1993 (Appendix D).

JURISDICTION

The opinion of the Court of Appeals was entered on July 18, 1994.

The Order Denying the Petition for Rehearing and Suggestion for Hearing En Banc was entered on August 30, 1994.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 1813(u)

Institution-affiliated party. The term "institution-affiliated party" means—

(1) any director, officer, employee, or controlling stockholder (other than a bank holding company) of, or agent for, an insured depository institution;

(2) any other person who has filed or is required to file a change-in-control notice with the appropriate Federal banking agency under section 7(j);

(3) any shareholder (other than a bank holding company), consultant, joint venture partner, and any other person as determined by the appropriate Federal banking agency (by regulation or case-by-case) who participates in the conduct of the affairs of an insured depository institution; and

(4) any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in—

(A) any violation of any law or regulation;

(B) any breach of fiduciary duty; or

(C) any unsafe or unsound practice,

which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured depository institution.

12 U.S.C. § 1818(i)(2)(G)

(2) Civil money penalty. . . .

. . . .

(G) Mitigating factors. In determining the amount of any penalty imposed under subparagraph (A), (B), or (C), the appropriate agency shall take

into account the appropriateness of the penalty with respect to—

(i) the size of financial resources and good faith of the insured depository institution or other person charged;

(ii) the gravity of the violation;

(iii) the history of previous violations; and

(iv) such other matters as justice may require.

12 U.S.C. § 1821(d)(14)(A)

(14) Statute of limitations for actions brought by conservator or receiver.

(A) In general. Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be—

(i) in the case of any contract claim, the longer of—

(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under State law; and

(ii) in the case of any tort claim (other than a claim which is subject to section 21A(b)(14) of the Federal Home Loan Bank Act), the longer of—

(I) the 3-year period beginning on the date the claim accrues; or

(II) the period applicable under State law.

28 U.S.C. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any

civil or criminal case, before or after rendition of judgment or decree . . . .

Revised Code of Washington 4.16.080

Actions limited to three years. The following actions shall be commenced within three years:

(1) An action for waste or trespass upon real property;

(2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;

(3) Except as provided in RCW 4.16.040(2), an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument;

(4) An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;

(5) An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity and by virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution; but this subdivision shall not apply to action for an escape;

(6) An action against an officer charged with misappropriation or a failure to properly account for public funds intrusted to his custody; an action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved,

or to such party and the state, except when the statute imposing it prescribed a different limitation: PROVIDED, HOWEVER, The cause of action for such misappropriation, penalty, or forfeiture, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statutes of limitations, or the bar thereof, even though complete, shall not be deemed to accrue or to have accrued until discovery by the aggrieved party of the act or acts from which such liability, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statute of limitation, or the bar thereof, even though complete, shall exist and be enforceable for three years after discovery by aggrieved party of the act or acts from which such liability has arisen or shall arise.

12 C.F.R. § 563.40(a), (b)

Restrictions on loan procurement fees, kickbacks and unearned fees.

(a) *Loan procurement fees.* No affiliated person of a savings association may receive, either directly or indirectly, from such association, any subsidiary thereof, or any other source any fee or other compensation of any kind in connection with the procurement of any loan from such association or subsidiary thereof.

(b) *Kickbacks and unearned fees.* The prohibitions contained in sections 8(a) and 8(b) of the Real Estate Settlement Procedures Act of 1974 (Pub. L. 93-533) shall apply to any fee, kickback, thing of value, and any portion, split or percentage of any charge, either directly or indirectly, given to or accepted by a

savings association or subsidiary or affiliated person thereof, in connection with any loan on real property made by a savings association or subsidiary thereof, without regard to whether the loan is within the term "federally related mortgage loan", as defined in section 3(1) of the Act.

STATEMENT OF CASE

Petitioner Jess T. Simpson ("Simpson") was the president and chairman of the Board of Directors of Cascade Savings Bank ("Cascade"), a Washington State savings and loan association, from 1955 to March 1990. During Simpson's 35-year tenure, Cascade earned a profit every year, including throughout the 1980s, when many thrift institutions failed.

Cascade is a healthy financial institution and has never been placed in

conservatorship or receivership by the Office of Thrift Supervision ("OTS") or any other regulatory agency. Cascade has never received any funds from any depository insurance program.

Immediately after Simpson resigned, Cascade hired K.P. Zech of Z-Associates, Inc., to conduct an investigation. Mr. Zech prepared a report that raised four potential claims against Simpson ("Zech Report").

Attorneys for Cascade presented Simpson with a copy of the Zech Report and made a claim for damages on behalf of Cascade. Cascade's attorneys gave Simpson a draft Complaint (Appendix G), to be filed in Washington State Superior Court.

Following unsuccessful settlement negotiations between Cascade and Simpson, OTS conducted an investigation. The

investigation was based upon the Zech Report, which Cascade had provided to OTS. Cascade's attorneys actively assisted OTS in the investigation, including assisting OTS in questioning witnesses served with OTS subpoenas.

There was no formal assignment of Cascade's claims to the OTS, nor anything remotely similar to an assignment. Nor was there any payment from depository insurance funds that would have given rise to a right of subrogation. The OTS has never explained how the claims owned by a solvent bank suddenly became claims of the OTS.

On February 12, 1991, OTS filed the Notice of Charges (Appendix F). The allegations in the Notice of Charges are virtually identical to those in the Zech Report and in the draft Complaint prepared

by Cascade's attorneys. The OTS ordered Simpson to make restitution to Cascade in the amount of $1,004,500 and imposed a civil money penalty of $134,313.

The Notice of Charges ordered restitution for four separate matters. One of those matters was a loan made in 1981 by Cascade. The Washington State statute of limitations had expired at least five years before the Notice of Charges was brought.

A hearing was held before Administrative Law Judge Paul S. Cross on August 26-30, 1991. Judge Cross issued a Decision on December 17, 1991 (Appendix B). Judge Cross recommended entry of an order requiring Simpson to make restitution in the amount of $594,946 and imposition of a civil money penalty of $138,013. The amount of restitution

awarded was substantially less than the amount sought by the OTS because Judge Cross found in favor of Simpson on a claim relating to the distribution of profit-sharing payments of $424,500 to Cascade managers.

Both OTS and Simpson appealed the ruling to T. Timothy Ryan, Jr., the Director ("Director") of the OTS. On November 18, 1992, the Director issued a Decision and Order ("Order") (Appendix C). The Order reversed the one portion of Judge Cross' Decision that was favorable to Simpson and directed Simpson to make restitution of $1,009,446.[1/] The Order reversed the imposition of civil money penalties against Simpson, on the grounds that OTS had totally failed to follow the

---

[1/]This reversal was not surprising because the Director signed the Notice of Charges.

statutory requirements for the imposition of a civil money penalty (Appendix C at 70-74). The Director issued a Subsequent Order (Appendix D), which is not relevant to the issues raised here.

Simpson filed a timely Notice of Appeal to the Ninth Circuit Court of Appeals. On July 18, 1994, the Ninth Circuit Court of Appeals issued its Opinion (Appendix A), which upheld the Order in its entirety. Simpson filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied on August 30, 1994 (Appendix E).

REASONS FOR GRANTING THE PETITION

I. STATUTE OF LIMITATIONS

The OTS cannot pursue claims which are time-barred under the applicable state statute of limitations.

One of the four claims in the Notice of Charges was based upon a loan made by Cascade in April 1981 to a company owned by Randy Previs ("Previs"). The loan was for the purpose of purchasing certain real property, and the loan was secured by a mortgage on that property. Contemporaneous with Cascade's consideration of the loan, Previs purchased a boat from Simpson.[2/] Judge Cross found that the purchase was at market price (Appendix B at 155-56). Simpson testified that the sale of his boat was independent of the loan and that he did not participate in the decision to make the loan.

[2/]Cascade's current attorneys, who have assisted the OTS in this matter, represented Previs in the purchase of Simpson's boat.

The loan to Previs went into default. In January 1983, Cascade commenced a judicial foreclosure of the loan in Kittitas County Superior Court. In March 1983, Previs filed a counterclaim in the foreclosure law suit. In those proceedings, all relevant facts relating to the purchase of the boat from Simpson were disclosed. The trial concluded in December 1983 with a foreclosure and a deficiency judgment in favor of Cascade. The property was later sold to a third party at a loss, and the deficiency judgment was never paid by Previs. Judge Cross found that Cascade realized a loss on the Previs Loan in the amount of $328,424.

The conduct of Simpson as alleged in the Notice of Charges, if true, would have constituted a breach of both state and

federal law and would have given rise to causes of action to Cascade. The draft Complaint (Appendix G) prepared by Cascade's attorneys alleged that Simpson's conduct with regard to the Previs loan constituted a breach of fiduciary duty under Washington common law, violation of a Washington banking statute, and violations of 12 C.F.R. § 563.40(a) and (b). Judge Cross entered findings very similar to the allegations of the draft Complaint.

The Washington State statute of limitations for actions of that nature is three years. Revised Code of Washington 4.16.080. Assuming that Cascade discovered its cause of action against Simpson no later than the trial in the foreclosure action in December 1983, those causes of action would have become

time-barred under Washington law no later than December 1986. Had Cascade filed its complaint in a court of law in 1991, all claims relating to the Previs loan would have been dismissed as time-barred. The same is true of the largest portion of a claim brought by the OTS relating to a company named Insurance Commerce, Inc. ("ICI").

However, Cascade did not file a lawsuit. Instead, the OTS filed administrative charges. The OTS took the position, and the Director ruled, that there was no statute of limitations that applied to the Previs and ICI claims.

The unanimous rule is that a cause of action held by a private party which has become barred under a state statute of limitations is not revived by the acquisition of that cause of action by a

federal agency. FDIC v. McSweeney, 976 F.2d 532, 534 (9th Cir. 1992), cert. denied, 113 S. Ct. 2440 (U.S. 1993); FDIC v. Former Officers & Directors of Metro. Bank, 884 F.2d 1304, 1309 n.4 (9th Cir. 1989), cert. denied sub nom. Lee v. FDIC, 496 U.S. 936 (1990); FDIC v. Consolidated Mortgage & Fin. Corp., 805 F.2d 14, 17-18 n.4 (1st Cir. 1986); FDIC v. Hinkson, 848 F.2d 432 (3d Cir. 1988); FDIC v. Cocke, 7 F.3d 396, 400 (4th Cir. 1993); FDIC v. Dawson, 4 F.3d 1303, 1307 (5th Cir. 1993), cert. denied, 1994 U.S. LEXIS 4461 (U.S. 1994); FDIC v. Regier Carr & Monroe, 996 F.2d 222 (10th Cir. 1993).

The rational for this longstanding rule is clear:

> Were this not the law, then the FDIC, FSLIC, or RTC could, by the mere act of taking conservatorship of a bank, revive claims relating to acts done during the Great

> Depression. Such an allowance would defy logic, and would obliterate any sense of repose granted by long-expired limitations periods.

Resolution Trust Corp. v. Krantz, 757 F. Supp. 915, 921 (N.D. Ill. 1991).

Petitioner has not found a single authority to the contrary. Although this Court has not ruled directly on this issue, several of the opinions cited above have relied in part upon language found in Guaranty Trust Co. v. United States, 304 U.S. 126, 142 (1938).

If the rule were applied to this matter, the claims relating to the Previs loan and ICI would be time-barred. The OTS was created in 1989 by the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") and arguably "acquired" the claims from Cascade at that

time.[3/] The Notice of Charges were not filed until 1991. This was long after the statute of limitations had expired.

Simpson raised this defense before both Judge Cross and the Director. Both of them denied the affirmative defense without any substantial discussion in their respective written decisions and without any discussion of the authority cited by Simpson.[4/]

The Ninth Circuit disposed of Simpson's defense in four simple sentences (Appendix A at 31-32). The opinion relied on the principle that if Congress has not

---

[3/]A very real question exists about how and when the OTS acquired the claims in the absence of an assignment, subrogation or receivership.

[4/]Indeed, one of the galling aspects of this matter is that the written opinions of Judge Cross and the Director fail to address virtually any of the legal arguments made by Simpson.

provided an express statute of limitations, the United States is not subject to any statute of limitations.

Although the principle relied upon by the Ninth Circuit is generally accepted, its application to this matter leads to an absurd result. FIRREA does contain express statutes of limitations for actions brought by regulatory agencies seeking restitution on behalf of failed banks, i.e., those placed in conservatorship or receivership. 12 U.S.C. § 1821(d)(14)(A). Inexplicably, FIRREA does not contain any express statute of limitations for actions brought on behalf of solvent banks, such as Cascade. Since Cascade was solvent, there was no express statute of limitations in FIRREA, and the Ninth Circuit ruled that

the Previs and ICI claims were thus not time-barred.

This result is backwards: If Cascade had failed, the OTS would have been precluded by 12 U.S.C. § 1821(d)(14)(A) from pursuing Simpson on the Previs and ICI claims, but because Cascade was solvent, the OTS could pursue those claims! It is inconceivable that Congress intended that the OTS and other regulators have greater powers to seek restitution for solvent banks than for failed banks. If anything, logic would dictate precisely the reverse.[5/]

Also, the Ninth Circuit opinion completely ignores the longstanding rule that claims which have expired under state

---

[5/]This anomaly supports Simpson's argument made below that FIRREA was never intended to allow claims to be brought by the OTS on behalf of solvent banks.

law cannot be revived by the subsequent acquisition of those claims by a regulatory agency. That rule conflicts with the principle relied upon by the Ninth Circuit, and the opinion nowhere attempts to reconcile the two.

Petitioner submits that the two can easily be reconciled by holding that the principle that the United States is not time-barred in the absence of an express statute does not apply to those circumstances in which the United States has acquired a cause of action previously held by a private party. If this reconciliation of the two rules of law is not made, the opinion will be in conflict not only with the general rule of the Ninth Circuit, but also with the general rule of at least five other circuits.

This Court has never addressed the issue presented here. Undoubtedly, there are many other persons in the same position as Simpson. If this matter is not reviewed by this Court, the OTS and other federal regulatory agencies will be free to pursue claims on behalf of solvent banks, without regard as to when those claims arose.

II. DENIAL OF DUE PROCESS

Simpson was denied due process because prosecutorial and judicial functions were combined in a single individual.

This is a case in which the prosecutor was also the judge and jury. Even the Ninth Circuit recognized that the system "is not a perfect one" and "exudes a possible appearance of impropriety" (Appendix A at 29-30).

The Notice of Charges was personally signed by the Director. The Notice of Charges did not state that the Director or an independent agency believed that probable cause existed, or any similar language, but expressly stated that Simpson "violated provisions of [law]" and "engaged in unsafe and unsound practices" and "knowingly and recklessly engaged in unsafe and unsound practices." (Appendix F at 2-4.) In the Notice of Charges, the Director not only stated that he had determined that violations had in fact occurred, but he also assessed a civil money penalty in addition to restitution.

The final Order was also signed personally by the Director. In reaching his final determination, the Director overruled Judge Cross and increased the

amount of restitution required of Simpson by $414,500.[9/]

"The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980). The neutrality requirement "preserves both the appearance and reality of fairness." Id. This doctrine was developed in cases involving judges whose additional functions created a risk of bias, such as In re Murchison, 349 U.S. 133 (1955), in which a judge acted as a one-man grand jury and presided over the trials of defendants whom he had charged. This Court held that "no man is permitted to try cases where he has an

---

[9/]The Director reversed Judge Cross on the issue of the profit-sharing distribution in the amount of $424,500 and also eliminated a $10,000 clerical error.

interest in the outcome." Id. at 136. This Court also has recognized that "an impartial decision maker is essential" in administrative proceedings, holding that the official who makes the final administrative ruling in a matter "should not . . . have participated in making the determination under review." Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (welfare). "The officer directly involved in making recommendations cannot always have complete objectivity in evaluating them." Morrissey v. Brewer, 408 U.S. 471, 486 (1972) (parole revocation).

"Our Constitution has long recognized that combining the roles of prosecutor and adjudicator in a single entity is a recipe for fundamentally unfair and erroneous decision making." Flores v. Meese, 942 F.2d 1352, 1368 (9th Cir. 1991) (en banc)

(Tang, J., concurring) (INS detention procedures). The "combination of investigative and adjudicative functions" in a single agency may be permissible. Withrow v. Larkin, 421 U.S. 35, 47 (1975). But a single individual who has participated in the initiation of an administrative enforcement proceeding cannot constitutionally participate in its adjudication. Amos Treat & Co. v. SEC, 306 F.2d 260, 266-67 (D.C. Cir. 1962) (staff member who recommended filing charges later became commission member). Similarly, a single public official cannot act both as an administrative decision maker and as an advocate in a related judicial proceeding. Walker v. City of Berkeley, 951 F.2d 182, 184-85 (9th Cir. 1991) (city attorney made de facto personnel decision and litigated against

employee); American Gen. Ins. Co. v. FTC, 589 F.2d 462, 464 (9th Cir. 1979) (FTC commissioner disqualified from participating in decision because he had appeared as counsel in same proceeding, even if his participation as counsel was "superficial").

The function of an administrative officer who makes the initial determination that a violation has occurred "is akin to that of a prosecutor or civil plaintiff." He acts as the complaining party in the administrative action. Marshall, 446 U.S. at 247. Because that officer has already formulated a judgment regarding the case, he "may become 'so psychologically wedded' to one position that he 'would consciously or unconsciously avoid the appearance of having erred or changed position.'"

National Rifle Ass'n v. U.S. Postal Serv., 407 F. Supp. 88, 94 (D.D.C. 1976) (quoting Withrow v. Larkin, 421 U.S. 35, 57 (1975)). "It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations." Like a judge who has been part of the accusatory process, an administrator "cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those [he] accused." See Murchison, 349 U.S. at 137.

In National Rifle Ass'n, due process was denied when the final decision on an application for a special postal rate was made by the same official who initially denied the application and formed "a well-defined predisposition" about it. 407 F. Supp. at 94. In Cruz v. Ferre, 571 F.

Supp. 125 (S.D. Fla. 1983), aff'd, 755 F.2d 1415 (11th Cir. 1985), a city cable television ordinance permitted a single official to initiate complaints, assess their validity, preside over a hearing, and make a final determination. "[T]hese procedures, by concentrating the functions of complainant, jury, judge and 'executioner' in one person, do not comport with the fundamental notion of fairness implicit in due process." Id. at 133.

To establish a due process violation, it is not necessary to show that the adjudicator has a pecuniary interest in the outcome of a case or that he is biased about a specific case. Ward v. Village of Monroeville, 409 U.S. 57, 60, 61 (1972) (mayor who sat as judge was potentially biased because traffic fines were paid to

municipality). See United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc., 787 F.2d 128, 138 (3d Cir. 1986), aff'd sub nom. Pension Benefit Guar. Corp. v. Yahn & McDonnell, Inc., 481 U.S. 735 (1987) (statute allowing pension fund trustees to determine liability of withdrawing employers unconstitutional because trustees had a fiduciary duty to maximize fund). The test is whether the situation

> "would offer a possible temptation to the average man as a judge to forget the burden of proof . . . , or which might lead him not to hold the balance nice, clear and true between the State and the accused."

Ward, 409 U.S. at 60 (quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927)). Moreover, the opportunity for an appeal from such an officer's decision, even if a

trial de novo is provided, does not cure the due process violation. A party is "entitled to a neutral and detached judge in the first instance." Id. at 61-62.

In the Notice of Charges, the Director initially determined that violations of law had occurred. When he issued a final enforcement proceeding, he was unlikely to reverse himself, and he did not. Since OTS was created in 1989, we are aware of only one case in which the Director has dismissed charges against an institution or individual. In re Caleb D. West, Jr., OTS Order No. AP 92-155 (Dec. 4, 1992). Although the hearing is held before an administrative law judge, the "safeguard" of having an independent judge is "illusory" because the Director, "who is heavily involved in the initial decision to issue the notice of charges,

also has the power (which, except in [one case] he has so far invariably used) to overrule the ALJ,"[7] even though he has not heard the witnesses and observed their demeanor.

Due process requires not only fairness but the appearance of fairness. Marshall, 446 U.S. at 242; Murchison, 349 U.S. at 136. Splitting the responsibility for enforcement and adjudication between different persons or bodies would "ensure that persons subjected to agency enforcement action are provided with, or at least will feel that they have been provided with, fairer procedures and better protection from over-zealous regulators than is the case with a unitary

---

[7] American Bar Association Working Group on Lawyers' Representation of Regulated Clients, "Laborers in Different Vineyards?" at 99 n.269 (Discussion Draft Report dated Jan. 22, 1993).

adjudication system." Lawrence G. Baxter, Judicial Responses to the Recent Enforcement Activities of the Federal Banking Regulators, 59 Fordham L. Rev. S193, S241-42 (1991).

The Director's institutional role is incompatible with that of an impartial adjudicator. He serves as the chief enforcement officer for the federal banking laws, a political appointee whose mission is to rid the industry of its undesirables to help resolve a major crisis. The Director, who initiates an enforcement proceeding, is personally motivated to bring it to a "successful" conclusion. The public comments of T. Timothy Ryan, Jr., the Director who initiated and decided Simpson's case, including his comments on pending cases,

demonstrate that he functioned primarily as an advocate, not as a judge.[8/]

In Withrow, the Supreme Court held that the "combination of investigative and adjudicative functions" in a single agency does not necessarily violate the Constitution. 421 U.S. at 47. In that case, however, when the Wisconsin medical examining board initiated an investigation, it "stated only that it would investigate whether proscribed conduct had occurred." There was no risk of bias or prejudgment because the board had not predetermined the case before its hearing was held. Id. at 54.[9/] Here, the

---

[8/] Due to their length, Mr. Ryan's public comments are set forth at the end of this Petition, at pages 61-63.

[9/] Similarly, in FTC v. Cement Inst., 333 U.S. 683, 702-03 (1948), due process was not denied in an enforcement proceeding because members of the FTC had (continued...)

Director stated in the Notice of Charges that OTS was "of the opinion that Jess T. Simpson . . . [had] violated provisions" of applicable regulations and had "knowingly and recklessly engaged in unsafe or unsound practices and breached his fiduciary duty to Cascade . . . ." (Appendix F at 2-4.)[10/]

[9/](...continued)
expressed their opinion regarding an issue of law, i.e., whether an industry-wide pricing system was unlawful. Justice Black noted that "judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact." Id. at 703.

[10/] As stated by the Director in another decision, "The Director may file a Notice of Charges when, 'in [his] opinion' the target of the action has engaged in an unsafe or unsound practice in conducting the business of an OTS-regulated institution, or has violated any law, rule, regulation or written condition or agreement with the agency. See 12 U.S.C. § 1818(b)(1)." In re Keating, OTS Order No. AP 91-20, at 25-26 (May 11, 1991) (emphasis supplied) (brackets in original).

As noted by the Ninth Circuit in Walker, 951 F.2d at 185, the investigative and adjudicative functions at issue in Withrow were performed by separate persons. Similarly, in Schweiker v. McClure, 456 U.S. 188, 191 (1982), which upheld a statutory delegation of Medicare claims decisions to private insurance carriers, the hearing officers who adjudicated the claims had not participated in the cases prior to the hearing stage. The risk of bias is far greater when a single individual performs multiple functions. Without regard to the personal beliefs of the Director who ruled in this case, the enforcement mechanism employed by OTS creates an excessive "risk of bias or prejudgment" that violates the Due Process Clause.

The opinion of the Ninth Circuit acknowledged that "[c]ertainly, when the Director signs the charges and thereafter makes a decision on the charges, it exudes a possible appearance of impropriety" (Appendix A at 29-30). Having acknowledged that appearance of impropriety, the Ninth Circuit went on to find that there was no denial of due process.[11/]

In reaching its conclusion, the Ninth Circuit stated that although the Notice of Charges and the Order were signed by the Director, the Director's "participation at the commencement of the pleadings is minimal" (Appendix A at 28) and the "Director does not investigate or prosecute the case" (Appendix A at 29).

11/ The Third Circuit reached a similar conclusion in In re Seidman, 1994 WL 498653 (3d Cir. Sept. 14, 1994).

Those statements are not supported by any facts in the record. The record is silent about the procedures of the OTS and the Director's personal involvement. Other than the Director's absence from the hearing before Judge Cross, the only relevant facts reflected in the record are that both the Notice of Charges and the Order were signed personally by the Director.

The Ninth Circuit also concluded that the entire system, including the right to an appeal, provided safeguards against any denial of due process. Simpson respectfully submits that the "protections" relied upon by the Ninth Circuit are more illusory than real. That is because the standard of review is based upon the existence of substantial evidence, which will exist in every case.

That is the standard applied by the Ninth Circuit when it ruled on the portion of Simpson's appeal relating to the profit-sharing distribution (Appendix A at 33).

The illusory nature of the safeguards of the appellate process is best illustrated by a simple example. Assume the evidence in favor of the agency is 40% and the evidence in favor of the bank officer is 60%. An impartial judge or jury would rule in favor of the bank officer. However, a biased head of an agency would rule in favor of the agency (or, as in this case, reverse the findings of an administrative law judge), notwithstanding the fact that only 40% of the evidence favored the agency. When the matter reached the Circuit Court, the agency could point to the 40% of the evidence and argue that it is

"substantial." The bank officer has no opportunity to argue that the evidence was 60% in his favor, because the appellate court does not engage in the weighing of evidence.

That is the hidden flaw in the system. If the person making the determination is not free from bias, the right of appeal is no right at all.

Admittedly, as the Ninth Circuit was quick to point out, Simpson cannot point to any evidence in the record that the Director was biased against him personally. The fact that the Director may not have made any public pronouncements regarding this precise matter does not demonstrate that he is unbiased towards persons in Simpson's position. The Director's public pronouncements demonstrate a decidedly

prosecutorial bent in those cases significant enough to receive the attention of the media. As pointed out above, the burden is not on Simpson to prove the Director is biased against him personally. The burden on Simpson is to point out the flaw in the system, and he has done so.

The Ninth Circuit also pointed to the Director's reversal of the imposition of a civil money penalty as demonstrating his freedom from bias. At the hearing before Judge Cross, the OTS failed to introduce any evidence whatsoever in support of the elements that must be considered before a civil money penalty can be imposed. 12 U.S.C. § 1818(i)(2)(G). The Director's reversal of Judge Cross on this issue does not demonstrate impartiality, but rather recognition that the imposition of the

civil money penalty was totally improper and would have been reversed by the Ninth Circuit.

Due process prohibits the prosecutor from also being the judge and jury, and yet that is precisely what happened here.

III. FIRREA DOES NOT GRANT OTS AUTHORITY TO PURSUE CLAIMS ON BEHALF OF SOLVENT BANKS

The OTS should not be allowed to pursue claims for restitution in administrative hearings when those claims could have been pursued by Cascade in a court of law.

After Simpson resigned in 1990, Cascade hired an investigator who prepared the Zech Report. Cascade's attorneys then prepared a draft Complaint (Appendix G) to be filed in state court. The Complaint was based upon the Zech Report.

Cascade's attorneys and Simpson's attorneys then negotiated for several months. Simpson raised a number of defenses to the Complaint, including the expiration of the Washington State statute of limitations.

Unable to coerce Simpson into a pre-litigation settlement, and realizing that Simpson had meritorious defenses, Cascade, in effect, handed the matter over to the OTS. There was no formal assignment of the claims, no subrogation based on payments made by the OTS, and no conservatorship or receivership, or anything else. The OTS simply began to pursue the identical claims against Simpson through its internal administrative proceedings.

If Cascade had pursued the claims in state court, Simpson would have had many

protections that were not available to him in the administrative proceedings held by the OTS. The most obvious example is the defense based on the statute of limitations. The rebuttal to that defense raised by the OTS would not have been available to a private party.

There are other substantial differences between trials and administrative hearings, including independent judges, the right to a jury, the right to discovery and the application of rules of evidence. Those protections which Simpson would have had in a lawsuit brought by Cascade were effectively denied to him in the administrative proceedings.

The difference in the results between judicial and administrative proceedings can be demonstrated with two simple examples.

First, had this matter been brought in court, all of the Previs claim and most of the ICI claim would have been dismissed on the grounds that they were barred by the applicable state statutes of limitations. As discussed above, the OTS overcame this defense because it was a government agency. Cascade is not a government agency, and Simpson would have prevailed on the statute of limitations defense in a lawsuit brought by Cascade.

Second, Judge Cross made factual findings in favor of Simpson regarding a profit-sharing distribution made to Cascade managers (Appendix B at 171, Finding 169). Presumably, a trial judge or jury would have made the same factual finding. However, the Director overruled Judge Cross' findings and instituted an additional $424,500 in restitution. Had

this matter been brought in court, there would have been no person or agency in the position of the Director peremptorily to overrule the factual conclusions of Judge Cross.

It cannot be disputed that Simpson would have substantially prevailed had this matter been brought in court by Cascade. It also cannot not be disputed that Cascade was fully capable of bringing the claims in court and was in fact prepared to do so.

The question presented is: when Congress passed FIRREA, did it intend to allow federal banking agencies to pursue claims for monetary damages on behalf of solvent banks that are capable of pursuing the identical claims in court? Petitioner submits the answer is no.

As the former President and Chairman of the Board of Directors of Cascade, Simpson is a former "institution-affiliated party" as that term is defined by 12 U.S.C. § 1813(u). If FIRREA is read literally, the OTS did have the authority to bring this action.[12/] That is because of the broad wording of the act, which was hurriedly passed by a Congress faced with the infamous "savings and loan crisis."

However, Simpson submits that the facts of this matter are unique. We have not found a single case in which a federal regulatory banking agency has pursued a claim for damages against a former institution-affiliated party on behalf of a bank that is fully solvent, that has

---

[12/]Simpson does not dispute the authority of the OTS to bring an action to prohibit Simpson from further banking activity. However, Simpson had retired and that claim was moot.

never been placed in conservatorship or receivership and that has never received any depository insurance funds.

The purpose of FIRREA is clear: to protect the nation's banks and the solvency of the depository insurance programs. For that reason, the OTS and other regulatory agencies were granted broad powers to pursue claims for restitution. In many circumstances, that is very appropriate. When a bank is insolvent and has been placed in receivership with a regulatory agency, the regulatory agency is clearly the appropriate party to bring claims. Similarly, when a regulatory agency has provided financial assistance to a bank, that agency should acquire the rights to the claims either through assignment or subrogation. When a target defendant

remains in control of the bank so that the bank cannot be expected to pursue any claims, it is also appropriate for the regulatory agency to pursue the claims. The same is true when a bank simply does not have either the resources or the will to pursue the claims. In all of these circumstances, the claim will either be brought by the federal agency, or not at all.

None of those circumstances are present here. Cascade is not in receivership, it has never received any insurance funds, it was not under the control of Simpson at the time the Notice of Charges was filed, and it was fully prepared to pursue the claims against Simpson. Indeed, it not only conducted its own investigation, but it also

retained attorneys who drafted a complaint to be filed in state court.

Cascade was fully prepared to pursue its claims in state court. It provided Simpson with a copy of the draft complaint in the hopes of reaching a negotiated settlement. However, a strange thing happened. Simpson refused to be cowed. Through his attorneys, Simpson pointed out to Cascade that he had many defenses to their claims and that Cascade would probably not prevail in a court of law.

In apparent recognition of this, Cascade in effect "handed the ball" to the OTS to pursue the claims administratively. As soon as that occurred, many of Simpson's defenses, including the defense based on the statute of limitations, disappeared.

Simpson would have prevailed in court, but he lost in the administrative proceedings, in part for the reasons argued in Sections I and II above. This is unjust and cannot be what Congress intended. Congress could not have intended that federal agencies should pursue what are essentially civil claims on behalf of banks that are fully capable of doing so themselves.

If that were the law, there would be no end to it. Every time a federally insured bank found itself with a difficult claim it wished to pursue against any affiliated party, the bank could simply call upon OTS or the FDIC to prosecute the claim on its behalf administratively. For example, if a federally insured bank had a dispute with a bill submitted by its accountants for an audit performed by

those accountants, rather than sue the accountants, the bank could simply ask the OTS or FDIC to pursue the accountants administratively. That would obviously deny the accountants all of the protections of due process of law, and it would obviously be improper.

What happened here is not so far from that example. Simpson left Cascade almost a year prior to the filing of the Notice of Charges. Had he been sued by Cascade, he would have substantially prevailed; in administrative proceedings before the OTS the outcome was preordained.

Simpson raised this argument in the portions of his appeal to the Ninth Circuit that he was denied the right to an Article III Judge and trial by jury (issues not raised here). In response, the Ninth Circuit noted that the OTS need

not wait for insolvency before taking action to protect the insurance funds (Appendix A at 21). Simpson agrees with that observation and does not dispute the fact that the OTS may take actions to prevent insolvencies. However, there must be some threshold test which must be met before the OTS can act. All of the acts of Simpson had been concluded, and Simpson had resigned from Cascade almost a year prior to the filing of a Notice of Charges. There was nothing to "prevent." Cascade was clearly solvent, and there was no risk to the insurance fund or any other interests of the OTS.

There is simply nothing in the record to indicate a substantial public interest which would justify OTS' pursuing these claims against Simpson through internal administrative proceedings. Lack of

authority to proceed has apparently never troubled the OTS. In the words of Circuit Judge Silberman:

> We recognize that S & L investors are now about as popular in Washington, D.C. as were Hollywood screen writers in the early 50's or oil company executives in the early 70's. Perhaps that explains why OTS' efforts in this case to circumvent the statutory language strike us as attributable not so much to creative lawyering as to excessive zeal.

Wachtel v. OTS, 982 F.2d 581, 586 (D.C. Cir. 1993).

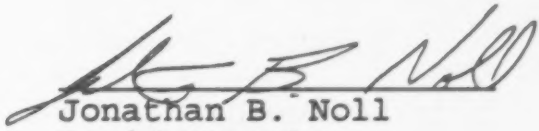
Simpson respectfully submits that this is another instance of excessive zeal demonstrated by the OTS. Congress could not have intended a federal agency to pursue what is essentially a private dispute in the absence of any insolvency or payment from a depository insurance fund or a well-grounded threat of either. Congress does not intend the OTS to be a

surrogate for healthy financial institutions that are fully capable of pursuing their civil claims in a court of law.

CONCLUSION

For the reasons stated above, Petitioner Jess T. Simpson respectfully submits that his Petition for a Writ of Certiorari should be granted.

Respectfully submitted this 22nd day of November, 1994.



Jonathan B. Noll
David Utevsky

FOSTER PEPPER &
SHEFELMAN
Suite 3400
1111 Third Avenue
Seattle, Washington
98101
(206) 447-4400

Mr. Ryan's Public Comments (footnote 8)

Mr. Ryan initiated a public relations campaign designed to show the public that the Bush Administration was taking aggressive action against bank officers through administrative proceedings and judicial actions. In 1990 Mr. Ryan joined Justice Department officials to announce the Administration's "top 100" list of savings institutions that had been selected for priority enforcement action. He said, "If the Justice Department is successful in a large number of these cases, I would think it would have a strong positive impact." He added that he envisioned the compilation as a "living list" in which new institutions would be added as high-priority cases were successfully prosecuted. David Johnston, 100 Possible Cases of Savings Fraud Given U.S. Priority, N.Y. Times, July 7, 1990, at 1.

Mr. Ryan formulated a new policy in 1990 to give greater publicity to the OTS' actions. He said the policy was "necessary in today's environment to reassure the public that as regulators we are doing everything possible to assure the integrity of thrift institutions and the protection of the taxpayer." Robert D. Hershey, Jr., Thrift Office Will Open Its Cases, N.Y. Times, July 6, 1990, at D1.

When OTS commenced an administrative proceeding against Thomas Spiegel, Mr. Ryan said, "This is a landmark action by O.T.S. in more than sheer magnitude. It

exemplifies just how seriously we intend to pursue violations of fiduciary responsibility to protect the taxpayer." Robert D. Hershey, Jr., Thrift Office Will Open Its Cases, N.Y. Times, July 6, 1990, at D1.

When a civil action and administrative proceedings were commenced against Charles Keating, Jr., Mr. Ryan said, "We believe Mr. Keating and his associates profited from improper use of depositors' funds, and we want that money returned to Lincoln [Savings]." He also described the case as "the most significant enforcement action" OTS had brought. Nathaniel C. Nash, Keating and Five Associates Sued by Savings Regulator, N.Y. Times, Aug. 10, 1990, at D1. When Keating's lawsuit against the Government was dismissed, Mr. Ryan told the press, "This is an extremely important victory in a very significant case." Stephen Labaton, Judge Rejects Keating Suit; Sees 'Looting' of Lincoln, N.Y. Times, Aug. 24, 1990, at D1.

When the OTS began an administrative case against David L. Paul, Mr. Ryan pointed out that the case was the agency's second largest after the Keating case. Although the charges might come before him for review at a later stage, he commented that Mr. Paul was motivated by "insatiable vanity and greed." Stephen Labaton, Return of $30 Million Sought From Ex-Chief of Centrust, N.Y. Times, Oct. 23, 1990, at D1.

When a former developer, Don R. Dixon, received a five-year sentence for a fraud conviction, Mr. Ryan commented that the length of the prison term was "very disappointing" and "a small price to pay, given the damage Mr. Dixon did to the savings industry. Substantial sentences are required to provide punishment commensurate with the losses to the taxpayers and to deter similar conduct in the future." Thomas C. Hayes, Texan Gets Five Years in Big S.&L. Collapse, N.Y. Times, Apr. 3, 1991, at D1.

In announcing a settlement with Coopers & Lybrand, Mr. Ryan said, "This is a significant case for O.T.S., for those who provide professional services to insured institutions and for the public. It says loud and clear that we hold accountants, lawyers and other professionals accountable for their actions, just as we do S.&L. directors and officers." Martin Tolchin, Accounting Firm's Pact on S.&L.'s, N.Y. Times, Dec. 13, 1990, at D7. In a California speech regarding discriminatory practices by financial institutions, Mr. Ryan said, "We take very aggressive action against institutions that violate the statutes which limit their activities." Bank Policies Found Biased, N.Y. Times, Nov. 2, 1992, at D5.